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IN THE

Supreme Court of the United States

October Term, 1970

NO. 1132

NEBEL TOWING COMPANY, INC., ET AL.,
Petitioners,

versus

OLYMPIC TOWING CORPORATION,
Respondent.

IN THE MATTER OF NEBEL TOWING COMPANY, INC., as owner *pro hac vice* and G.H., Inc., as owner of the Tug G-H, praying for exoneration from, or limitation of, liability.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Nebel Towing Company, Inc., G.H., Inc., United States Casualty Company, and Horace John Defriez, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on July 9, 1969.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana, entered herein on

May 22, 1968, is unreported. It appears in the record at pages 788-809, and is printed in Appendix A hereto, pp. 14-30.

The opinion of the United States Court of Appeals for the Fifth Circuit, dated July 9, 1969, not yet reported officially, is reported unofficially in 1969 AMC 1571, and is reproduced in Appendix B hereto, pp. 35-51, together with the order denying the petition for rehearing *en banc* by a 7-6 vote and the dissenting opinion of Chief Judge Brown.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 9, 1969. A timely petition for rehearing *en banc* was denied on November 24, 1969, and this petition for certiorari was filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the Louisiana Direct Action Statute violates the Limited Liability Act, impairs the constitutional grant to the federal government of exclusive jurisdiction in maritime matters, and destroys the uniformity of Admiralty law by imposing on marine insurers liabilities beyond those for which the insured is legally liable.

STATUTORY PROVISIONS INVOLVED

This case involves the Limited Liability Act, 46 U.S.C. §181, et seq., the Louisiana Direct Action Statute,

La. R.S. 22:655 and Article 2098 of the Louisiana Civil Code. These are reprinted in pertinent parts in Appendix C, pp. 74-76.

STATEMENT OF THE CASE

This case arises under the general maritime and admiralty jurisdiction. Petitioners are the owner and bareboat charterer, respectively, of the tug G-H and their marine protection and indemnity insurers. Respondent, Olympic Towing Corporation, is the owner of the M/V CARINTHIA.

Olympic Towing Corporation filed a libel (now complaint) against Nebel Towing Company, Inc., owner *pro hac vice* and bareboat charterer; G.H., Inc., owner of the tug G-H; and United States Casualty Company and Underwriters at Lloyd's[1], primary and excess marine protection and indemnity insurers, respectively, of the tug G-H, to recover damages sustained as a result of the sinking of the CARINTHIA, allegedly caused by the fault of the G-H. Nebel Towing Company, Inc. and G.H., Inc., filed a petition praying for exoneration from, or limitation of, liability, which was consolidated for trial with the aforementioned libel.

Following trial on the issue of liability, trial on the issue of damages having been deferred, the district judge found, as a matter of fact, that the casualty resulted from the fault of the crew of the G-H, without the privity and knowledge of the owners and/or bareboat charterers. Based upon these findings, the District Court entered an interlocutory decree, granting limitation of liability

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[1]Horace John Defriez, one of the petitioners herein, was designated to stand as defendant on behalf and for the account of all underwriters subscribing to Lloyd's policy.

to Nebel Towing Company, Inc. and G.H., Inc., but denying insurers the right to restrict their liability to that of their insured, i.e., to the amount of the limitation fund. The Court decreed that the defense of limitation of liability was a "personal defense" of the insured, not available to insurers, and that insurers were liable for the difference between the limitation fund of the G-H and the total amount of the damages sustained by the CARINTHIA.

The judgment of the District Court was affirmed by the Court of Appeals for the Fifth Circuit. A timely application for rehearing *en banc* or, alternatively, for rehearing, was denied by a 7-6 vote after the Court had been polled at the request of one of its members. Petitioners applied for a stay of mandate to seek review by this Court. On December 1, 1969, the Court of Appeals for the Fifth Circuit ordered the mandate stayed for a period of sixty days. This petition is filed within the sixty-day period.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CREATES A DIRECT CONFLICT WITH THE LIMITED LIABILITY ACT BY DEPRIVING THE VESSEL OWNER OF THE PROTECTION AFFORDED UNDER SAID ACT.

Sixteen years ago, in *Maryland Casualty Company v. Cushing* (The *Jane Smith* Case), 347 U.S. 409, 98 L. Ed. 806 (1954), this Court was confronted with the question of whether the application of the Louisiana Direct Action Statute to marine insurance would violate "* * * the Limited Liability Act and the constitutional grant to the federal government of exclusive jurisdiction in maritime

matters."[2] Judge Wright, then U.S. District Court Judge of the Eastern District of Louisiana, and now Circuit Judge of the United States Court of Appeals, District of Columbia, had dismissed the Direct Action against insurers holding that:

> " . . . To give effect to the direct action statute of Louisiana by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general maritime law but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act. Title 46, § 183, U.S.C.A."[3]

The lower Court's judgment was reversed by the United States Court of Appeals for the Fifth Circuit. In a 4-1-4 decision, this Court vacated the judgment of the Court of Appeals. Four Justices of this Court held that "In addition to encroachment upon the federal statutory system for bringing all claims into concourse, the direct action statute is in conflict with the congressional policy of limited liability,"[4] while four Justices were of the opinion that no conflict existed. "To break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation,"[5] the Court deferred an answer to the question posed by the procedural device of remanding the case to the District Court until after the completion of the limitation proceeding.

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[2] 347 U.S. at 412, 98 L. Ed. at 812.

[3] *Cushing v. Texas & P. Ry. Co.*, 99 F.S. 681, 684 (E.D. La. 1951).

[4] 347 U.S. at 417-418, 98 L. Ed. at 815.

[5] 347 U.S. at 423, 98 L. Ed. at 818.

The question raised in *Cushing* has remained unanswered until now.[6]

The 4-1-4 decision of this Court in *Cushing*, the 7-6 vote of the United States Court of Appeals for the Fifth Circuit in this case in denying the application for rehearing and Chief Judge Brown's opinion, in which Judges Dyer and Simpson joined, dissenting from the denial of the rehearing, emphasize the importance and complexity of the question presented, which, petitioners submit, squarely falls within the purview of Rule 19 of the Rules of the Supreme Court of the United States,[7] and merits consideration by the Court in the interest of settling finally the uncertainty left by *Cushing*.

Rather than re-iterating in full the arguments advanced by insurers in the *Cushing* case, *supra*, we adopt the opinion of the four Justices of this Court in that case, who held, after a complete analysis of the constitutional and procedural conflicts between the Limited Liability Act and the Louisiana Direct Action Statute, that the Direct Action Statute was in conflict with the Limited Liability Act and

> " * * * was a disturbing intrusion by a State on the harmony and uniformity of one aspect of maritime law."[8]

The decision of the Court of Appeals in the instant

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[6]In the intervening 16 years, this unresolved question has created numerous needless complications and uncertainty as indicated by the citations contained in footnote 1 of Chief Judge Brown's dissenting opinion. App. B, p. 54.

[7]Rule 19. Considerations Governing Review of Certiorari.
"1. *** The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
(b) Where a court of appeals *** has decided an important question of federal law which has not been, but should be, settled by this court; ***"

[8]347 U.S. at 422, 98 L. Ed. at 818.

case not only runs counter to congressional policy as expressed in the Limited Liability Act, but is also highly discriminatory in that it affects only vessel owners operating in Louisiana territorial waters.[9]

Since marine insurance risks are rated according to the individual vessel owner's loss record, there is little doubt but that the decision, if upheld, will result in higher premium rates to those vessel owners, and, perhaps, even unavailability of insurance coverage for Louisiana risks. As stated in The *Jane Smith* case, 347 U.S. at 417:

> "Furthermore, insurers, unable to rely on the limitation of liability of their insured and denied the benefits of the concursus, would in all likelihood reflect the increased costs in their premiums, thus passing on to the very class sought to be benefited by the federal legislation the short-circuiting effects of the State statute."

2. THE DECISION BELOW DESTROYS THE UNIFORMITY OF ADMIRALTY LAW BY IMPOSING ON MARINE INSURERS LIABILITIES BEYOND THOSE FOR WHICH THE INSURED IS LEGALLY LIABLE, CONTRARY TO APPLICABLE LOUISIANA LAW, AND IN DEROGATION OF THE TERMS OF THE POLICIES.

The Louisiana Direct Action Statute, R.S. 22:655, set out verbatim in Appendix C, pp. 74-75, does nothing more than abrogate the traditional "no action" clause con-

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[9]In passing, it might be added that the decision is equally discriminatory to the tort victim unfortunate enough to have been injured in waters other than those of the State of Louisiana.

tained in liability policies.[10] It does not create causes of action.[11] It merely permits an injured party to sue the insurer directly, subject, however, to the provisions, conditions, limitations and exclusions of the policy.[12] The insurer as a party defendant in a direct action stands exactly in the same shoes as the insured,[13] and, in addition to its policy defenses, is entitled to all of the defenses of the insured, except "personal" defenses of the insured.[14]

There is no holding by the Louisiana courts as to whether or not a defense of, or the right to, limitation of liability results from the nature of the obligation or is a personal defense of the insured. The Court below held

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[10]There is considerable doubt as to whether or not the Direct Action Statute is applicable at all to ocean marine insurance. It should be noted that R.S. 22:655 is merely one of a number of Articles contained in Part XIV of the Louisiana Insurance Code. The First Article in Part XIV, Article 611, entitled "Scope of Part" provides as follows:

"The applicable provision of this Part shall apply to insurance other than ocean marine and foreign trade insurances ***."

[11]*Finn* v. *Employers' Liability Assurance Corp.*, 141 So.2d 852, 864 (La. App. 1962).

[12]The pertinent part of R.S. 22:655 provides that:

"Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy are not in violation of the laws of this State."

[13]*Ex Parte Tokio Marine & Fire Ins. Co.*, 322 F. 2d 113, 116 (5th Cir. 1963). See also, *Degelos* v. *Fidelity & Casualty Company*, 313 F.2d 809, 815, in which the Court of Appeals for the Fifth Circuit stated that:

"Under the Direct Action Statute, the case may proceed against the insurer, but *liability depends on legal liability of the assured.* Whether, as the Act permits, the assured is joined with the insurer, *the standard* for recovery is identical." (Emphasis supplied)

[14]"Article 2098. Defenses available to debtors in solido.

Art. 2098. A codebtor *in solido*, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors. He cannot plead such exceptions as are merely personal to some of the other codebtors." La. Civil Code.

that since the defenses of infancy, coverture, charitable immunity, and governmental immunity have been held to be personal defenses by the Louisiana courts, the defense of limitation of liability was likewise a personal defense. Petitioners respectfully submit that the reasoning of the Court is based upon a *non sequitur*, and a failure to distinguish between purely personal defenses and defenses which are part of and inherent in the obligation itself. As is pointed out forcefully in Chief Judge Brown's opinion, dissenting from the denial of the rehearing:[15]

> "The defense of the Shipowner's Liability Act is one to put a ceiling on recovery.
>
> Unlike sovereign immunity, charitable immunity, minority, coverture, or the like, Shipowner's Limitation Act does not exonerate the shipowner."
>
> * * *
>
> "The right to limit liability is not one which inheres in the 'person' of the shipowner. It is available to a shipowner of a specific vessel under some circumstances. It is not available under others. It does not turn upon his status as shipowner. And it is not a right which he as shipowner can claim. *The right to limit inheres in the nature of the obligation giving rise to the underlying obligation and the shipowner's participation in it under the concepts of 'privity or knowledge'.*
>
> "This ceiling, this insulation, is one that inheres in 'the nature of the obligation.'" (Emphasis supplied)

After properly defining the defense of limitation of

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[15]Appendix B, 61, 63.

liability as one inherent in the nature of the obligation, Chief Judge Brown concludes that:

> "On this approach it is a direct interference with and restraint upon the congressional policies assuring limitation of liability to the value of the vessel after the casualty to treat the shipowner's right to limit as the so-called personal defense under the Louisiana Codal Article 2098. * * * it is clear to me that this is in no sense a 'personal' defense of the caliber of sovereign immunity, charitable immunity, or the like."

The defense of limitation of liability arises from the "nature of the obligation" to the same extent as, if not more so than, a contractual limitation of liability which has been held to inhere in the "nature of the obligation" so as to preclude recovery against insurers. *Alcoa Steamship Company v. Charles Ferran & Company*, 251 F.S. 823, aff. 383 F. 2d 46 (5th Cir. 1967), cert. den. 393 U.S. 836, 21 L.Ed.2d 107.

In *Alcoa, supra*, the insured's obligation was limited by contract. In the instant case the insured's obligation is fixed and limited by law, i.e., an Act of Congress. Insurers' obligation, in turn, by the express terms of the policy, is limited to the legal liability of the insured.[16]

The policy under consideration provides that the insurer "undertakes to pay * * * such sums as the as-

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[16]That the policy was never intended to cover more than the *legal* liability of the assured is further evidenced by the following provision in the policy:

"Notwithstanding the foregoing this Company will not pay for:

* * *

Any liability assumed by the assured beyond that imposed by law; provided, however, that if by agreement, or otherwise, the assured's legal liability is lessened, then this Company shall receive the benefit of such lessened liability." R. Vol. II, p. 815.

> sured, as owner of the [Steel Diesel Tug G-H], shall have become *legally* liable to pay * * *" (Emphasis supplied) (R., Vol. II, p. 815).

Since the insured's legal liability is limited to the amount of the limitation fund, insurers' liability, under the specific and unequivocal language of the policy, can be no greater. The lower Court's decision is palpably erroneous and, in the words of Chief Judge Brown:

> "The Court's reading rewrites the contract, imposes liability beyond that of the assured and ignores substantive limitations on liability under maritime principles. The essential uniformity of the admiralty is at an end when for a like casualty across the line in Texas the 'liability' of the shipowner is less — by the amount of total damages and the policy limits — than it is in Louisiana." App. B, pp. 70-71.

CONCLUSION

This case involves fundamental questions involving the interpretation and application of a federal statute, as to which questions there was a direct conflict among the members of this Honorable Court, as constituted in 1954, and there presently exists a direct conflict among the thirteen members of the United States Court of Appeals for the Fifth Circuit, as evidenced by the 7-6 vote denying the application for rehearing in the instant case. Therefore, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed first class, postage prepaid, to Cornelius G. Van Dalen, Hibernia Bank Building, New Orleans, Louisiana, attorney for respondent, Olympic Towing Corporation, this day of , 1970.

JOHN W. SIMS

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 5099

IN ADMIRALTY

SECTION D

OLYMPIC TOWING CORPORATION
V.
NEBEL TOWING COMPANY, INC.,
U. S. CASUALTY COMPANY
JOHN DOE and/or XYZ INSURANCE
COMPANIES, and The M/V G-H,
and engines, etc., and Barges A, B, C, D and E

NO. 5187

IN ADMIRALTY

SECTION D

CONSOLIDATED

IN THE MATTER OF NEBEL TOWING COMPANY, INC., AS OWNER PRO HAC VICE AND CHARTERER: AND G.H., INC., AS OWNER OF THE TUG G-H, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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BOYLE, District Judge:

Olympic Towing Corporation (hereafter Olympic), owner of the M/V CARINTHIA, instituted this action against Nebel Towing Company, Inc. (hereafter Nebel), as owner and/or charterer of the M/V G-H, and United States Casualty Company, Nebel's liability insurer,[1] to recover damages occasioned by the sinking of the M/V CARINTHIA allegedly resulting from improper operation of the M/V G-H and her tow.[2]

Subsequently, Nebel petitioned for exoneration from, or limitation of, liability. These two proceedings were consolidated and trial was held on the issue of liability.

Libelant claims that in the pre-dawn hours of October 19, 1961 the Tug CARINTHIA was proceeding in an easterly direction in the Intracoastal Waterway pushing two barges and, upon nearing an "S" bend in this narrow channel, made radio contact with the Tug G-H which, at

[1]United States Casualty Company is a proper party respondent herein by virtue of the provisions of Louisiana Direct Action Statute, La. R.S. 22:655. Plaintiff also sued the John Doe and XYZ Insurance Companies, the real identities of which are unknown to this date.

[2]The five dumb barges comprising the tow of the M/V G-H at the time of the incident complained of were libeled. However, the claimants of those barges moved for summary judgment or dismissal and those motions were granted.

the same time, was nearing the same bend from the opposite direction with five barges in tow on a hawser. Libelant claims that the radio communication resulted in an agreement whereby the M/V G-H and her tow would "hold up" east of the "S" bend and, additionally, that the CARINTHIA would pass the G-H and her tow on "one whistle" (port to port). However, according to libelant, as the CARINTHIA reached the bend, port to port passing signals having been exchanged, the G-H, instead of "holding up" as agreed, came on. Since the channel was narrow and time and distance left her no alternative, the CARINTHIA proceeded forward to pass the G-H and tow. After the flotillas had drawn partially abreast, the sternmost barge of the G-H tow were caused to swing out past mid-channel into the path of the CARINTHIA, which, in order to avoid collision, turned toward her starboard (toward the south bank) in the course of which maneuver she was stove in by an unidentified underwater object as a result of being thus crowded out of the channel and into the shallow area adjacent to the bank. After proceeding a short distance, the CARINTHIA began to take water. She disconnected from her barges, went up the bank, and finally rolled over on her side.

The respondent, on the other hand, contends that when the G-H and her tow approached the "S" bend, radio contact was made with the CARINTHIA and the pilot of the G-H informed the pilot of the CARINTHIA that his tug and tow were stopped on the north bank awaiting the clearing of sporadic fog conditions. The interests of the G-H strenuously urge that the G-H and her tow were stopped on the north bank completely on her own side of mid-channel and therefore did not embarrass navigation of the CARINTHIA.

During the course of the trial only four witnesses testified in person. Two of these were expert witnesses. The testimony of the remaining two was only tangential to the issue of liability. All other testimony crucial to the Court's decision was admitted by way of deposition.

While trying cases through the extensive use of depositions makes for brief trials it robs the Court of the opportunity personally to observe and, when necessary, interrogate the witnesses, both extremely helpful in ascertaining their accuracy and/or veracity. Thus deprived, the Court's task of determining what facts are established by a preponderance of the "credible" evidence becomes more difficult. Courts can be pressed little short of frustration in cases like this one wherein the testimony adduced by the opposing interests is fraught with unequivocal and categorical contradictions, as opposed to those inconsequential inconsistencies and incongruities which can be often explained to a greater or lesser extent by failure of memory. In the light of these perplexities and after a careful analysis of all the testimony, certain preliminary observations relative to the Court's modus operandi in arriving at its findings of fact would seem in order.

The four witnesses whose testimony was admitted through deposition were: E. N. Dicks, the relief captain of the M/V CARINTHIA; Eulice Joe Adkinson, the wheelman (and relief captain of the M/V G-H); Billie B. Coulter, a deckhand aboard the M/V G-H; and Antoine Kilbin Billiot, the captain of the M/V CEPHEUS II. All of these witnesses were on duty in their respective capacities on their respective vessels at all times material to the incident under consideration.

A. K. Billiot was in control of a vessel, the CEPHEUS II, which was not directly involved with this litigation. Indeed, he occupies the position of a disinterested bystander, with no ostensible purpose for siding with the interests of the M/V CARINTHIA as against the interests of the M/V G-H. Also of significance is the fact that a comprehensive statement taken from Billiot within a few days of the incident involved is part of the record and does not vary in any important detail from his subsequent statement or his deposition testimony.

The testimony of Adkinson is in hopeless conflict with that of Dicks on virtually every critical link in the chain of events culminating in this incident. Coulter, who would naturally be expected to corroborate Adkinson, does so on some points, but contradicts the testimony of his captain in many significant areas.

Therefore, in arriving at its findings the Court relied heavily on the testimony of Billiot which substantiates the account of this incident as related by Dicks. Accordingly, the credence placed in the testimony of Adkinson and Coulter decreased as the gap between their account and that of Dicks and Billiot widened. Libelant bore its burden of proof, establishing a prima facie case of liability, and the evidence adduced by respondent simply lacks the convincing force necessary to defeat libelant's claim.

Consequently, after full consideration of all the evidence, as well as the pre-trial and post-trial briefs of counsel, judgment was entered in favor of Olympic Towing Company and against respondents on the issue of liability in Admiralty 5099 and judgment was entered in favor of petitioners in Admiralty 5187, limiting their liability to the value of the Tug G-H and its towage

charges, such limitation being personal to petitioners and, therefore, unavailing to their insurers.

In connection with the judgments thus entered, the Court makes the following:

FINDINGS OF FACT

1.

Olympic Towing Corporation is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, with its office and principal place of business in New Orleans, and was the owner and operator of the M/V CARINTHIA, Official No. 261072, a single screw, 900 horsepower diesel tugboat. She was 81.1 feet in length, 24.1 feet in width, and approximately 9.5 feet in draft and was equipped with radar, radio and searchlights.

2.

Nebel Towing Company, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, with offices in New Orleans, Louisiana, and was at all material times the owner pro hac vice and bareboat charterer of the M/V G-H, Official No. 266806. The M/V G-H was owned by G-H, Inc. and is a single screw, diesel tugboat of approximately 600 horsepower. She was 55.9 feet in length, 20.1 feet in width, and about 5 feet in draft and was equipped with radar, radio and searchlight.

3.

United States Casualty Company is a foreign insur-

ance corporation and was at all material times the liability insurer of Nebel Towing Company, Inc. and the Tug G-H.

4.

During the early pre-dawn hours of October 19, 1961, the M/V CARINTHIA, pushing a tow consisting of two empty barges made up rigidly ahead for push towing, was eastbound in the Intracoastal Waterway approaching Mile 120, west of Harvey, Louisiana. Each barge was 290 feet in length and 50 feet in width.

5.

At the same time, the M/V G-H was towing on a hawser-bridle arrangement five barges, four of which were empty, and was proceeding westerly in the Intracoastal Waterway approaching Mile 120. Each barge was approximately 200 feet in length and 35 feet in width. The five barges were made up in line more or less rigidly, with the last or sternmost barge being loaded. Thus the total length of the M/V G-H and tow was in excess of 1050 feet.

6.

The Tug CEPHEUS II, with Captain A. K. Billiot at the wheel, was proceeding in the same direction as the M/V CARINTHIA and at all material times followed behind the CARINTHIA at a distance of 100 yards. The CEPHEUS II was not equipped with radar, but Billiot had ascertained that the CARINTHIA was radar equipped. Consequently, Billiot, aware that although the fog was not so dense as to prevent his overtaking the

CARINTHIA and proceeding ahead using his eyes for radar at the time he commenced following the CARINTHIA, decided to navigate behind the CARINTHIA borrowing her radar, anticipating that the possibility of decreased visibility ahead could make him totally dependent upon the CARINITHIA to lead him through. Other than the coincidental relationship just described, there is no evidence that there was any nexus between the CEPHEUS II its owners, or crew and the CARINTHIA, its owners, or crew, which would deprive Billiot of the status of a disinterested witness.

7.

There is an "S" or double bend in the Intracoastal Waterway at Mile 120. The channel of the waterway is maintained to a width of 125 feet and a depth of 12 feet by the United States Corps of Engineers. In the vicinity of Mile 120 the waterway is 200 feet from water's edge to water's edge with sloping banks ascending gradually from the 125-foot width channel.

8.

There was a very light northeasterly wind and a slight westerly current, each being approximately 2 miles per hour. There was intermittent fog or haze of varying density in the general vicinity of Mile 120 on the night of October 18 and early morning of October 19, but visibility at the time and place of the incident sued upon was from one-half mile to a mile in light haze. The somewhat restricted visibility did not preclude safe navigation at that time.

9.

Sometime after midnight, radio communication was established between the CARINTHIA and the G-H and this communication was monitored by Billiot aboard the CEPHEUS II. The gist of the conversation between Dicks and Adkinson was that the G-H and its tow would "hold up" east of the "S" bend at Mile 120 and that the CARINTHIA would pass the G-H on "one whistle" (port to port). During the course of this conversation each pilot revealed his position and described his tow. It appears that at the time this agreement was consummated the CARINTHIA was located at about Mile 125 and the G-H was located at about Mile 117.

10.

At or near 1:15 A.M., the CARINTHIA entered the area of the Mile 120 "bends" and was then making about 4 miles per hour when the G-H was perceived to be underway, negotiating the bends in mid-channel contrary to the radio agreement between the CARINTHIA and the G-H and the speed of the CARINTHIA was reduced to 2 miles per hour.

11.

The CARINTHIIA, with the CEPHEUS II behind, continued forward as did the G-H which then was making about 3 to 4 miles per hour. As the tow of the CARINTHIA was drawing abreast of the G-H, the G-H and the CEPHEUS II exchanged one-whistle passing signals. No danger signals were ever sounded by any of the vessels involved.

12.

The pilots of the CARINTHIA and the G-H, once having reached the point at which they exchanged passing signals, had no alternative but to attempt to effectuate the passing due to the length and breadth of their tows and the narrow confines of the waterway. The bends were such as to conceal the approach of the G-H from the pilot of the CARINTHIA, even when aided by radar. Hence, Dicks was unaware of the approach of the G-H until just before the signals were exchanged, after which the CARINTHIA reduced her speed to bare steerageway.

13.

As the CARINTHIA drew past the Tug G-H and was in the process of passing the G-H's tow, the sternmost barges of the tow swung across mid-channel toward the south bank into the path of the CARINITHIA and her barges. In order to avoid a collision with the G-H's tow, the CARINTHIA was turned toward her starboard (south), successfully avoiding any contact between the flotillas. Had the tow of the G-H stayed in the position with respect to mid-channel in which it was located when the vessels drew abreast, there would have been no necessity for the CARINTHIA to take evasive action.

14.

As the tow of the G-H continued swinging southward, the CARINTHIA and tow having past, the CEPHEUS II, highly maneuverable without tow, effected its passing, narrowly escaping collision.

15.

As a result of having been forced into the shallow area adjacent to the bank, the CARINTHIA struck an unidentified submerged object, probably a stump, causing that vessel to jolt and roll. Shortly thereafter, the crew of the CARINTHIA became aware that the bilges were flooding and every attempt was made to pump the water out faster than it came in while the CARINTHIA was proceeding slowly ahead.

16.

Once it became apparent to the crew of the CARINTHIA that the flooding was gaining on the pumps, a radio call for help was made and the CARINTHIA was turned to the bank and the task of detaching her from her barges was begun. Meanwhile, the CEPHEUS II, which had overtaken the CARINTHIA after both vessels had passed the G-H, allowed the CARINTHIA to again assume the lead as the fog encountered became increasingly more dense. Upon hearing CARINTHIA's call for assistance, the CEPHEUS II came up alongside and lent her portable pumps in an effort to keep the stricken vessel afloat and stood by rendering other assistance. Finally, all attempts to forestall the inevitable notwithstanding, the CARINTHIA rolled over and sank. At approximately 5:00 A.M. the fog lifted sufficiently to enable the CEPHEUS II to resume her journey, leaving the stricken vessel and its barges to the care of the Tug WESTERN CITIES which had by then arrived at the scene.

17.

The crew of the Tug G-H was composed of a captain,

a mate or relief captain (here Adkinson) and two deckhands. Adkinson and a deckhand, Coulter, were on duty at all times material to this incident. Adkinson had considerable experience working on the Intracoastal Waterway. Coulter had no previous experience working aboard tugs on the Intracoastal Waterway, but he had been in the Navy for 5 years.

18.

Herman Nebel was President of both Nebel Towing Company, Inc. and G-H, Inc. and was co-owner with his wife, Georgia Nebel, of 99% of the stock in both corporations. Ray Nebel, Herman Nebel's brother, apparently held the other 1% of the stock in each corporation. Herman Nebel, and in his absence Georgia Nebel, controlled and directed the affairs of these corporations. Herman Nebel had investigated Adkinson and Coulter prior to taking them on as crewmembers aboard the G-H.

19.

Herman Nebel left it to the discretion of his captain to determine whether or not particular barges should be pushed ahead or towed behind. The equipment necessary to employ either method was supplied.

20.

There was no method of direct communication between the crew of the G-H and the Nebels. All communications had to be placed through the marine operators. The system in effect at the time of this incident required the crew of the G-H to call the marine operator once each hour for a "traffic check" in order to ascertain whether

or not Nebel desired to communicate with them. If the operator indicated that Nebel was so inclined, the crewman aboard the G-H would have the operator place a call to Nebel. Of course, any time the crewmen aboard the G-H desired to communicate with Nebel, a call could be placed through the operator. There is no evidence at any time pertinent to this incident there was any communication between the crewmembers of the G-H and the Nebels.

The radar aboard the Tug G-H was checked regularly by a manufacturer's technician and was of a type in common use on the Intracoastal Waterway.

22.

On July 27, 1962, a Commissioner was appointed by this Court to ascertain and compute the amount representing petitioners' interest in the Tug G-H and her freight as of October 19, 1961. Pursuant to that appointment, the Commissioner held a hearing and rendered a report. The report was approved by the Court on January 18, 1963 and the findings therein relative to value were adopted as the findings of this Court.

The Commissioner found the petitioners' interest in the G-H to be $35,000.00 and the value of the pending freight (towage charges) to be $1,067.00.[3] Thus, petitioners' total interest in the G-H on October 19, 1961 was $36,067.00.

[3]The parties stipulated before the Commissioner that the amount of the towage charges was $1,067.00. They reserved the right, however, to contest the legal status of such fees as "freight then pending" within the meaning of that term as used in 46 U.S.C. § 183.

CONCLUSIONS OF LAW

1.

The Court has jurisdiction of the causes and venue is properly laid in the Eastern District of Louisiana.

2.

The sole proximate cause of the damages sustained by the M/V CARINTHIA was the statutory fault and otherwise negligent conduct of those in charge of the M/V G-H.

3.

The operators of the M/V G-H were guilty of serious statutory fault in failing to keep the tow of the G-H to the starboard side of mid-channel in a narrow channel.[4]

4.

The operators of the M/V G-H were negligent in failing to keep their radio agreement with the pilot of the M/V CARINTHIA whereby the M/V G-H was to "hold up" above the Mile 120 bends, in failing to maintain control of their tow, and in allowing their tow to crowd the M/V CARINTHIA to the south bank.

5.

Although neither the M/V CARINTHIA nor the M/V G-H sounded danger signals, such failure was not a proxi-

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[4] 33 U.S.C. § 210. The Intracoastal Waterway is a narrow channel within the purview of 33 U.S.C. § 210. See *Lee* v. *Candies*, 216 F. Supp. 666 (E.D. La., 1963), aff'd 323 F. 2d 363 (5th Cir., 1963).

mate or contributing cause of the crowding, since, by the time the danger became apparent the sounding of danger signals would have been a useless formality.[5]

6.

The operators of the M/V CARINTHIA were not guilty of any statutory fault or negligent conduct proximately contributing to this incident. If the operators of the M/V CARINTHIA were guilty of fault, such fault was only minor or technical, and was not a contributing cause of this incident.

7.

This casualty was caused by the fault of the crew of the M/V G-H, as set forth hereinbefore, without the privity or knowledge of the owners and/or bareboat charterers of the M/V G-H.

8.

The M/V G-H was in all respects seaworthy; her crew and her equipment were adequate. But for the fault of her relief captain, she could have made a safe and uneventful passage through the Mile 120 bends.

9.

Therefore, the owners and/or charterers of the M/V G-H are denied exoneration from, but are granted limitation of, liability pursuant to the provisions of 46 U.S.C. § 183.

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[5]See *Griffin on Collision*, 1949 Edition, Section 80, p. 225.

10.

The term "freight then pending"[6] encompasses towage charges, stipulated in this case to have amounted to $1,067.00.

11.

The owners and/or charterers of the M/V G-H are entitled to limitation of liability for damages arising out of the crowding and sinking of the M/V CARINTHIA on October 19, 1961 to the sum of $36,067.00, plus interest.

12.

The defense of limitation of liability is personal to the owners and/or charterers of the M/V G-H and is *not* available to their insurers.[7]

Thus, the plaintiff, Olympic Towing Corporation, is

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[6]Although it appears that the Court of Appeals for the Fifth Circuit has not had occasion to pass on the question of whether or not "freight then pending" includes towage charges, other courts have considered the question. See *In Re Pacific Inland Navigation Company*, 263 F. Supp. 915 (D. Hawaii, 1967) and the cases cited therein. See also the discussion in *Benedict on Admiralty*, Sixth Edition, Vol. 3, Section 503, pp. 456-567 and the cases referred to therein.

Generally speaking, there seems no reason not to require the owner or demise charterer of a tug or towboat seeking limitation to surrender his towing charges, as well as his vessel. Particularly should this be the rule where all or some of the following factors are present: (a) the amount of the charges is easily ascertainable; (b) what constitutes the "voyage" is not in dispute; (c) the voyage is completed and the charges are fully earned. Why should the owner of a cargo-carrying vessel be required to surrender freight charges, the owner of a passenger vessel be required to surrender passenger fares, but the owner of a towboat or tugboat be excused from surrendering such towage fees as may be allocable to the voyage during the course of which the incident giving rise to the petition for limitation occurs? This Court finds no significant distinctions among these situations.

[7]*In Re Independent Towing Company*, 242 F. Supp. 950 (E.D. La., 1965).

entitled to recover of and from said defendants, Nebel Towing Company, Inc., G. H., Inc., U. S. Casualty Company, John Doe Insurance Company and XYZ Insurance Company, jointly, severally and in solido, damages suffered by plaintiff up to the amount of the limitation fund, represented by the aforesaid ad interim stipulation herein in amount of $36,067.00, plus interest at 6% thereon from April 9, 1962, until cancelled by order of this Court upon satisfaction of judgment herein; and against said U. S. Casualty Company, said John Doe Insurance Company and said XYZ Insurance Company, pursuant to the Louisiana Direct Action Statute (LSA-RS 22:655) for the difference between the total amount of said limitation fund, including the interest aforesaid, and the total amount of plaintiff's provable damages, with interest on the entire judgment at the rate of 5% per annum from the date of the casualty herein, October 19, 1961, until paid, and costs.

Counsel shall submit a decree in accordance with the foregoing Findings of Fact and Conclusions of Law.

/s/ Edw. J. Boyle, Sr.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
May 22nd, 1968.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

NO. 5099

IN ADMIRALTY

SECTION D

OLYMPIC TOWING COMPANY

versus

NEBEL TOWING COMPANY, INC., U. S. CASUALTY COMPANY, JOHN DOE and/or XYZ INSURANCE COMPANIES, and The M/V G-H, her engines, etc., and Barges A, B, C, D and E

NO. 5187

IN ADMIRALTY

SECTION D

CONSOLIDATED

IN THE MATTER OF NEBEL TOWING COMPANY, INC., as owner *pro hac vice* and charterer; and G. H., INC., as owner of the Tug *G-H*, praying for exoneration from or limitation of liability

INTERLOCUTORY DECREE

This cause came on for trial on October 19, 1967;

Present:

Messrs. Deutsch, Kerrigan & Stiles
Cornelius G. Van Dalen, Esq.,
Eldon T. Harvey, III, Esq.,
Attorneys for Plaintiff and Claimant
Olympic Towing Corporation

Messrs. Phelps, Dunbar, Marks, Claverie & Sims
John Poitevent, Esq.,
Attorneys for Defendants,
Nebel Towing Company, Inc., G-H, Inc.,
U. S. Casualty Company, John Doe
and/or XYZ Insurance Companies and
The M/V G-H, her engines, etc.

and having been duly submitted to the court for decision on the pleadings and proofs adduced by the parties, and the testimony of the witnesses having been considered; and the court, after due deliberation, having, on May 22nd, 1968, handed down its findings of fact and conclusions of law holding defendants, Nebel Towing Company, Inc., G-H, Inc., U. S. Casualty Company, John Doe Insurance Company and XYZ Insurance Company and the M/V G-H, liable for the full amount of damages sustained by plaintiff, Olympic Towing Corporation, which forms the subject matter of the within action, and holding further that petitioners, Nebel Towing Company, Inc., as owner *pro hac vice*, and G-H, Inc., as owner of the Tug G-H are entitled to limit their liability to the value of the Tug G-H and its towage fees, represented herein by *ad interim* stipulation in amount of $36,067, with interest thereon at six percent from April

9, 1962, until cancelled by order of this Court; and holding further that the defense of limitation of liability is personal to the shipowner and/or charterer, said G-H, Inc., and Nebel Towing, Inc., may not be urged by their insurers, said U. S. Casualty Company, said John Doe Insurance Company and said XYZ Insurance Company.

NOW, on motion of Cornelius G. Van Dalen of Messrs. Deutsch, Kerrigan & Stiles, attorneys for plaintiff, it is

ORDERED, ADJUDGED AND DECREED that plaintiff, Olympic Towing Corporation, recover of and from said defendants, Nebel Towing Company, Inc., G. H., Inc., U. S. Casualty Company, John Doe Insurance Company and XYZ Insurance Company, jointly, severally andd *in solido*, damages suffered by plaintiff up to the amount of the limitation fund, represented by the aforesaid *ad interim* stipulation herein in amount of $36,067, plus interest at 6% thereon from April 2, 1962, until cancelled by order of this court upon satisfaction of judgment herein; and against said U. S. Casualty Company, said John Doe Insurance Company and said XYZ Insurance Company, pursuant to the Louisiana Direct Action Statute (LSA-RS 22:655) for the difference between the total amount of said limitation fund, including the interest aforesaid, and the total amount of plaintiff's provable damages, with interest on the entire judgment at the rate of five (5%) percent per annum from the date of the casualty herein, October 19, 1961, until paid, and all costs; and it is further

ORDERED, ADJUDGED AND DECREED that unless, within twenty days from the entry of this decree, the parties aforesaid shall have agreed upon the quantum of damages, the court, upon application of either

plaintiff or defendants, will appoint a commissioner to ascertain and compute the amount due plaintiff in the premises, and to report the same to the court with all convenient speed.

New Orleans, Louisiana, this 22nd day of May, 1968.

/s/ Edw. J. Boyle, Sr.

UNITED SATES DISTRICT JUDGE

DEUTSCH, KERRIGAN & STILES

By: /s/ Cornelius G. Van Dalen

CORNELIUS G. VAN DALEN
Attorneys for Plaintiff

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26386

OLYMPIC TOWING CORPORATION,

Plaintiff-Appellee,

versus

NEBEL TOWING COMPANY, INC., ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 9, 1969)

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

GEWIN, Circuit Judge: The appellee, Olympic Towing Corporation, brought this suit in the United States District Court for the Eastern District of Louisiana against the appellants — Nebel Towing Company, Inc. and Nebel's insurer, United States Casualty Company — to recover damages occasioned by the sinking of

*Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

Olympic's vessel, the M/V CARINTHIA, allegedly resulting from the improper operation of Nebel's vessel,[1] the M/V G-H, and her tow. The suit against Nebel's insurer was brought pursuant to Louisiana's direct action statute.[2] Nebel thereafter petitioned the district court for exoneration from liability on the ground that the G-H was not the cause of the CARINTHIA's sinking; alternatively, Nebel sought to limit its liability, under the federal Limitation of Liability Act,[3] to the amount of its interest in the G-H and the freight pending (towage charges). After a full trial, the district court found, *inter alia*, that the G-H had caused the CARINTHIA to sink but that the owner had been without privity or knowledge of any wrongdoing; accordingly, the court held that Nebel was not entitled to be exonerated but was entitled to limit its liability. However, the court held that the Limitation Act is a personal defense available only to the vessel owner; thus the court held that Nebel's insurer could not limit the amount recoverable in the direct actions.[4] Nebel and its insurer, supported by the American Institute of Marine Underwriters as amicus curiae, appeal from

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[1]The G-H was owned by G-H, Inc. and bareboat chartered to Nebel. For purposes of the issues in this case, a bareboat charterer is the owner. See 46 U.S.C. § 186 (1964).

[2]La. R.S. 22:655 (Supp. 1964). The statute was amended in 1962, subsequent to the events in this case, but the amended language does not affect any rights involved here.

[3]The pertinent portion of the Act provides:

> The liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183(a) (1964).

[4]The district court's order was an interlocutory decree which left for determination the amount of the insurer's liability. The order is appealable under 28 U.S.C. § 1292(a)(3) (1964). *See* Caradelis v. Refineria Panama, S.A., 384 F.2d 589, 591 n.1 (5th Cir. 1967).

the court's rulings denying exoneration and holding limitation of liability to be a personal defense. Olympic cross-appeals from the court's ruling allowing Nebel to limit liability. We affirm the judgment of the district court.

I

Virtually all the evidence in this case pertinent to the question of liability is disputed. However, a bare outline of the facts surrounding the central incident is discernible in the district court's pre-trial order. Sometime about midnight on October 19, 1961, the G-H and the CARINTHIA were traveling in opposite directions in the Gulf Intracoastal Waterway, the G-H moving westward and the CARINTHIA moving eastward and each approaching Mile 120. The G-H was towing five barges astern and the CARINTHIA was pushing two barges ahead. Another tug, the CEPHEUS II, was following the CARINTHIA in order to take advantage of the latter's radar in case of dense fog. Mile 120 falls directly in the middle of two bends in the Waterway, which forms a sort of attenuated "S" at that point. Apparently because of the difficulty of navigating the double bend, the vessels communicated by radio and agreed that the G-H would "hold up" east of the bends and let the CARINTHIA pass port to port. The CARINTHIA subsequently passed the G-H somewhere in the vicinity of Mile 120. However, in the process of passing, the CARINTHIA veered out of the channel toward the south bank and struck an unidentified underwater object. She immediately began to take more water than her pumps could handle. When it became clear that efforts to keep her afloat would fail, she moved up the bank where she finally rolled over on her

side. The district court found, as Olympic had contended, that the G-H had permitted her barges to swing beyond mid-channel, thus forcing the CARINTHIA to leave the channel in order to avoid collision. Therefore, the court concluded that the sinking of the CARINTHIA was attributable to the embarrassment of her navigation by the G-H.

Since all testimony directly concerning the events upon which liability hinges was admitted by way of depositions, we must agree with Nebel that our review of this evidence is de novo.[5] Granting this, however, Nebel has gained nothing, for the fact is that we are not inclined to disturb the district court's findings. The two witnesses who testified on behalf of Olympic — the captains of the CARINTHIA and the CEPHEUS II — described the crucial events in one light, while Nebel's two witnesses — the captain and deckhand of the G-H — related entirely inconsistent details. The district court prefaced its findings of fact with this cogent statement:

> A. K. Billiot was in control of a vessel, the CEPHEUS II, which was not directly involved with this litigation. Indeed, he occupies the position of a disinterested bystander, with no ostensible purpose for siding with the inter ests of the M/V CARINTHIA as against the interests of the M/V G-H. Also of significance is the fact that a comprehensive statement taken from Billiot within a few days of the incident involved is part of the record and does not vary in any important detail from his sub-

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[5] 4 Benedict on Admiralty § 573, at 66 (1940).

sequent statement or his deposition testimony.

> The testimony of Adkinson [relief captain on the G-H] is in hopeless conflict with that of Dicks [relief captain on the CARINTHIA] on virtually every critical link in the chain of events culminating in this incident. Coulter [deckhand on the G-H] who would naturally be expected to corroborate Adkinson, does so on some points, but contradicts the testimony of his captain in many significant areas.
>
> Therefore, in arriving at its findings the Court relied heavily on the testimony of Billiot which substantiates the account of this incident as related by Dicks. Accordingly, the credence placed in the testimony of Adkinson and Coulter decreased as the gap between their account and that of Dicks and Billiot widened. Libelant bore its burden of proof, establishing a prima facie case of liability, and the evidence adduced by respondent simply lacks the convincing force necessary to defeat libelant's claim.

It may be conceded that the record before this court contains considerable evidence favorable to Nebel's position. However, when the evidence is in complete conflict, the court must accept one version of the facts and reject the contrary version. Nebel's argument invites us to select its version and draw inferences from ambiguities which are favorable to its position. We must decline the invitation. In the circumstances of this case, we think the district court's approach was sound and that its findings are adequately supported.

Nebel also argues that, even if the tow of the G-H did force the CARINTHIA out of the channel, the sinking of the CARINTHIA was not proximately caused by the G-H because the crew of the G-H could not foresee that the CARINTHIA would strike a submerged object. Nebel relies upon testimony to the effect that it is unusual for a vessel to suffer damage when it runs outside the channel. Nebel argues that an event is not foreseeable unless it is a probable consequence of an act.

Generally, "proximate cause" in the admiralty context is defined as "that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened."[6] This definition obviously describes a cause-in-fact principle, while proximate cause in the common law is generally a question of the extent of the tortfeasor's duty.[7] Nebel here is clearly relying upon the latter concept. However, we cannot agree with Nebel's statement of the standard for determining proximate causation. We think that, in order for a risk to be foreseeable, "the consequences must be a normal, substantial part of the risk, which a reasonable man would recognize as fairly to be taken into account by the defendant at the time of his act."[8] Under this standard, it is patent that the G-H should reasonably have foreseen that some damage might result from forcing the CARINTHIA to leave the channel.

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[6]*See, e.g.*, Olsen v. States Line, 378 F.2d 217, 221 n.7 (9th Cir. 1967); 2 Norris, Law of Seamen § 689 (1962).

[7]*See generally* Gregory, *Proximate Cause in Negligence — A Retreat from Rationalization*, 6 U. Chi. L. Rev. 36 (1938).

[8]Prosser, Law of Torts § 48 at 259 (2d ed. 1955).

We must also reject Olympic's contention that Nebel should have been denied the right to limit its liability. Under the Limitation Act, a vessel owner can limit its liability only if the owner is without "privity or knowledge" of the act causing the loss.[9] Olympic attempts here to marshal sufficient facts to attribute privity or knowledge to a shareholder and officer of Nebel. However, the attempt fails because, as the district court found, there is simply nothing in the record which could be considered privity or knowledge, as broad and vague as those terms are.[10] Thus we think that the court below properly permitted Nebel to limit its liability.

II

The appellants and the amicus curiae launch a broad scale and many-faceted attack on the district court's holding that Nebel's insurer could not take advantage of Nebel's right to limit its liability. When the question presented here was before this court over fifteen years ago, we held that limitation was not available to an insurer in a direct action suit.[11] The Supreme Court reversed in *Maryland Cas. Co. v. Cushing*,[12] a 4-1-4 decision which established a procedural chronology for that case and implicitly disposed of many questions raised here. Four members of the Court took the view that Louisiana's direct action statute was in conflict with the Limitation Act and therefore that the state

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[9]46 U.S.C. § 183(a) 1964).

[10]Gilmore & Black, Law of Admiralty 695-96 (1957).

[11]Cushing v. Maryland Cas. Co., 198 F.2d 536 (5th Cir. 1952).

[12]347 U.S. 409, 98 L.Ed. 806 (1954). *See* Guillot v. Cenac Towing Co., 366 F.2d 898 (5th Cir. 1966).

statute must fall before paramount federal law.[13] Four other members agreed with this court, seeing no conflict whatever.[14] However, neither faction carried the day, for Mr. Justice Clark did not agree entirely with either and his vote was necessary to form a majority. Justice Clark saw no reason to invalidate Louisiana's statute because, in his view, any conflict between the state and federal statutes could be obviated by a procedural chronology; because of the deadlock in the vote, Justice Clark's approach became the court's disposition of the case:

> Our only interest is to make certain that such [direct] actions do not interfere with the Federal Limitation proceeding. To do this we need only require that the limitation proceeding be concluded first and the owner's liability settled under it. The petitioners could then discharge this liability, to the extent their policies covered it, by paying into the limitation proceeding the proper sum. The door would then be left open for prosecution of the direct actions against the insurance companies on the remaining coverage of the policies. Thus, whatever the insurers' liability may be under Louisiana law in the subsequent actions, the [vessel] owner's purse cannot be touched.[15]

As indicated by the last sentence quoted above, Mr. Justice Clark was concerned that, if the direct actions

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[13]347 U.S. at 410, 98 L.Ed. at 811 (Justices Frankfurter, Reed, Jackson, and Burton).

[14]347 U.S. at 427, 98 L.Ed. at 820 (Justices Black, Douglas, and Minton, and Chief Justice Warren).

[15]347 U.S. at 425, 98 L.Ed. at 819.

were completed prior to the limitation proceedings, the vessel owner's insurance might be exhausted in the direct action suits and thus deprive the vessel owner of the benefit of his insurance in the limitation proceeding. In the present case, the direct action and the limitation proceeding were consolidated in the same court and, therefore, no problem of insurance-fund exhaustion is presented. We reject the contention of the appellants and the amicus that future cases will present the problem because the federal court in admiralty does not have power to enjoin claimants from continuing with direct actions in other forums — especially state forums — prior to the limitation proceeding. We have already held that the federal admiralty court has ample injunctive power for the purpose of insuring the orderly and effective operation of the Limitation Act.[16] Thus it is clear that the court has the power — and, doubtless, the ingenuity — to devise effective procedures to protect rights under both the state and federal statutes.[17]

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[16]Guillot v. Cenac Towing Co., 366 F.2d 898, 904 (5th Cir. 1966). Since the stay of a direct action would be in aid of the admiralty court's jurisdiction, the appellants' reliance on 28 U.S.C. § 2283 (1964) is misplaced.

[17]It may be noted that the four dissenting Justices in the *Cushing* case argued that the direct actions should be permitted to proceed irrespective of the limitation proceeding. We do not adopt that view because a majority of the *Cushing* Court thought otherwise and, therefore, *Cushing* is probably controlling authority on this question. We do not intend to intimate, however, that the procedural chronology is inviolable. The reason for requiring the limitation proceeding to be completed first is to permit the vessel owner to receive the benefit of his insurance. Where the same purpose can be accomplished otherwise — *e.g.*, where, as in the present case, the direct action and the limitation proceeding are consolidated — or where a chronology would serve no purpose — *e.g.*, where there is only one claimant — the *Cushing* chronology need not be followed. *See* Guillot v. Cenac Towing Co., 366 F.2d 898 (5th Cir. 1966); Tokio Marine & Fire Ins. Co. v. Aetna Cas. & Surety Co., 322 F.2d 113 (5th Cir. 1963); Torres v. Interstate Fire & Cas. Co., 275 F. Supp. 784 (D.P.R. 1967); *In re* Independent Towing Co., 242 F. Supp. 950 (E.D. La. 1965).

The Court's disposition in *Cushing* implicitly disposed of two matters which the appellants and the amicus advert to only briefly, *viz.*, (1) the compatibility of a direct action with a concursus under the Limitation Act[18] and (2) the possibility that higher premiums would result if the insurer is held liable beyond the amount of the limitation fund, thus denying the shipowner full benefit of the Limitation Act. With regard to the first matter, although four members of the Court would have voided the direct action statute because of conflict between the proceedings, five members, including Justice Clark, took a contrary position. Moreover, the right to proceed with a direct action after a limitation proceeding has been completed is an implicit holding that the policy underlying the concursus is not so strong or pervasive as to abrogate rights under the direct action statute. We hold that any conflict between the direct action statute and the federal provision for a concursus of claims in admiralty is so minimal as to be insignificant.

Regarding the matter of higher premiums, even if this question had not been implicitly disposed of by *Cushing*, we would reject the contention. To begin with, since in the vast majority of cases limitation is denied for one reason or another, it may well be questioned how significantly the possibility of limitation figures into the actuarial computation of premiums.[19] Second, since the maritime industry quite often benefits from full recovery of losses, the policy underlying the Limi-

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[18]See 46 U.S.C. § 185 (1964).

[19]See Note, *Shipowners' Limited Liability*, 3 Colum. J. L. & Soc. Prob. 105, 114-15 (1967). *See* generally Comment, *Limitation of Liability in Admiralty: An Anachronism from the Days of Privity*, 10 Vill. L. Rev. 721 (1965).

tation Act is perfectly compatible with spreading losses through higher premiums. For example, the interest of the maritime industry in the present case is best served by permitting Olympic to recover its entire loss from the sinking of its vessel; the better policy would seem to favor slightly higher premiums, if really necessary, in order to avoid instances of severe loss. And finally, we do not think that the Limitation Act was intended to limit the amount of premiums paid by vessel owner on insurance. Therefore, we hold that the possibility of higher premiums is an insufficient basis for permitting an insurer to limit its liability.

The amicus also contests the jurisdiction of the district court under the proviso to subsection 1332(c) of the Judicial Code which states

> [t]hat in any direct action against the insurer of a policy or contract of liability insurance, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.[20]

The amicus argues that the direct action must rest upon diversity jurisdiction and that the quoted proviso destroys diversity between Olympic and Nebel's insurer. If the proviso applied to Olympic's action, we would have to agree. However, the proviso was not enacted until August 14, 1964, while Olympic's direct

[20] 28 U.S.C. § 1332(c) (1964).

action was filed in the district court on January 30, 1962. Thus it is clear that the new proviso is inappilcable to this case.

III

The appellants' remaining contentions depend upon the interpretation of Louisiana law. At the threshold, the amicus contends that Louisiana's direct action statute does not apply to marine insurance policies at all. This argument is made in the face of *Coleman v. Jahncke Serv., Inc.* where this court stated:

> The direct action statute, by its terms, applies to every "policy or contract of liability insurance." . . . "There is no indication in Sec. 655 that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies, while extending it to all others."[21]

Therefore, this question is now settled until the Louisiana courts decide the matter differently.

Next, the appellants and the amicus contend that the insurance policy involved here — a Protection and Indemnity Policy — does not permit a direct action. Although the appellants quote several clauses from the policy,[22] the clause primarily relied upon states in pertinent part:

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[21]341 F.2d 956, 960-61 (5th Cir. 1965) *quoting from* Cushing v. Maryland Cas. Co., 198 F.2d 536, 538 (5th Cir. 1952).

[22]We have considered and rejected the appellants' construction of the other clauses which provide as follows:

> In consideration of the premium and subject to the warranties, terms and conditions herein mentioned, this Company hereby undertakes to pay up to the amount hereby insured . . . such sums as the assured . . . shall have become legally liable to pay and shall have paid on account.

The difficulty with the argument is that the no-action clause quoted above is ineffective under Louisiana law.[23] The direct action statute becomes a part of every insurance policy having effect in Louisiana as though written into the policy.[24] As the court stated in *Hidalgo v. Dupuy:*

> The statute simply voids any policy clause which conditions the right of the injured person to enforce against the insurer its contractual obligation to pay the insured's debt upon, as prerequisite, the obtaining by the injured person of a judgment against the insured.[25]

It is expressly understood and agreed if and when the assured has any interest other than as a shipowner in the vessel named herein, in no event shall this Company be liable hereunder to any greater extent than if the assured were the sole owner and entitled to petition for limitation of liability in accordance with present and future law.
The assured shall at the option of this Company permit this Company to conduct, with an attorney of this Company's selection, at this Company's cost and expense and under its exclusive control, a proceeding in the assured's name to limit the assured's liability to the extent and in the manner provided by the present and any future statutes relative to the limitation of a shipowner's liability.

23*See* Ruiz v. Clancy, 162 So. 734, 735 (La. 1935).

24Humble Oil & Refining Co. v. Coon, 207 F. Supp. 45, 49 (E.D. La. 1962).

25122 So.2d 639, 644-45 (La. App. 1960).

Underlying this principle is the public policy of Louisiana which proclaims that liability insurance — including purported indemnity insurance — is issued primarily for the protection of the public rather than the insured.[26] We think it clear, therefore, that the clause relied upon here does not preclude a direct action.

The appellants' final contention is that the right to limit liability is not a "personal defense" under Louisiana law and, therefore, is available to Nebel's insurer in this case. The pertinent Louisiana statute provides:

> A codebtor *in solido*, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the co-debtors.
>
> He can not plead such exceptions as are merely personal to some of the other co-debtors.[27]

Although there is no definitive holding in point by the Louisiana courts, the appellants and the amicus argue by analogy that the limitation of liability is not a defense which is "merely personal to some of the co-debtors" but rather one "resulting from the nature of the obligation." The essence of the argument is stated with admirable conciseness in the appellants' brief:

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[26]*See* Musmeci v. American Automobile Ins. Co., 146 So.2d 496, 501 (La. App. 1962); Mid-South Ins. Co. v. Lewis, 236 F. Supp. 739, 741-42 (W.D. La. 1964), *aff'd* 358 F.2d 887 (5th Cir. 1966).

[27]LSA-C.C. art. 2098 (1952). It is undisputed that Nebel and its insurer are codebtors *in solido* under Louisiana law.

> The shipowner's obligation to his debtors, i.e. the claimants, for injuries to persons and property arising out of a marine disaster leading to a limitation proceeding, is limited in amount by the Limitation Statutes to the value of the vessel and pending freight. There can be no reason why such a statutory exception or exemption from liability, beyond the value of the vessel, cannot be said to result from the nature of the shipowner's obligation under Article 2098, just as a contractual limitation in amount can be said to result from the nature of the obligation. His obligation to his debtors is fixed and limited by the law of the land — an Act of Congress. It follows then, that the defense of limitation of liability is *not* a personal defense.

We are not, however, persuaded by this strained analogy. The nature of a "personal defense" under Louisiana law is explained in Judge Ellis' excellent opinion in *Alcoa Steamship Co. v. Charles Ferran & Co.*[28] After pointing out a number of defenses which have been held to be "personal" under Louisiana law — *e.g.*, infancy,[29] coverture,[30] charitable immunity,[31] governmental immunity,[32] bankruptcy.[33] Judge Ellis stated:

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[28]251 F. Supp. 823, 831 (E.D. La. 1966), *aff'd*, 383 F.2d 46, 56 (5th Cir. 1967).

[29]Rouley v. State Farm Mut. Automobile Ins. Co., 235 F. Supp. 786, 793 (W.D. La. 1964); LSA-R.S. 9:571.

[30]Edwards v. Royal Indemnity Co., 161 So. 191 (La. 1935).

[31]Lusk v. United States Fid. & Guar. Co., 199 So. 666, 667 (La. App. 1941).

[32]Brooks v. Bass, 184 So. 222, 224 (La. App. 1938).

[33]*See* Simmons v. Clark, 64 So.2d 520, 523 (La. App. 1953).

> Amongst these apparently varied "personal" defenses, one common denominator is discernible — each person possessing a "personal" defense obtained that defense because the law granted it to all members of his class as a matter of public policy. The personal defense attaches to the status. Hence parents, children, husbands, wives, governmental units, charitable organizations, bankrupts, lunatics, interdicts, vessel owners, and the like possess a defense denied their respective insurers.[34]

There is no question that the Limitation Act was designed to assist the maritime industry and that it was in no way intended to benefit the insurance industry.[35] Thus it is patent that statutory limitation of liability is only available to a shipowner; the status of insurer is not covered by the public policy underlying the Limitation Act. We therefore hold that limitation of liability under the federal statute is a personal defense which cannot be availed of by an insurer under Louisiana law.[36]

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[34]251 F. Supp. 823, 831 (E.D. La. 1966).

[35]*See Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 421-22, 423, 436 (1954); 3 Benedict on Admiralty § 598 (6th ed. 1940). *See generally* Note, *Shipowners' Limited Liability*, 3 Colum. J. L. & Soc. Prob. 105 (1967).

[36]The appellants attempt to analogize the Limitation Act to the Longshoremen's & Harbor Workers' compensation Act. 33 U.S.C. § 901 *et seq.* (1964), must fail. Since the Longshoremen's Act destroys the right to relief outside the statutory coverage, it would follow that a claimant could not proceed against the insurer on a nonexistent right to relief. The Limitation Act merely provides a special benefit to shipowners; it does not destroy the right to relief.

The appellants also raise the question whether other limitation statutes are personal defenses. It is sufficient in this case that we find that the benefit permitted by the Limitation Act is a matter personal to the shipowner; the determination of the personal or non personal nature of defenses permitted by other statutes will occur soon enough when cases involving those statutes arise.

Accordingly, the judgment of the district court is affirmed in all respects.

AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26386

OLYMPIC TOWING CORPORATION,
Plaintiff-Appellee,

versus

NEBEL TOWING COMPANY, INC., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana
(November 24, 1969)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

PER CURIAM: The court has concluded to make two changes in its opinion, neither of which has been specifically requested on petition for rehearing. The changes are as follows.

The first sentence of the second paragraph, Section I, as it appears on page 4 of the slip opinion is amended to read as follows:

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* Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

> Since all testimony directly concerning the events upon which liability hinges was admitted by way of depositions, and our ability to evaluate this evidence is comparable to that of the trial court, the application of the "clearly erroneous" standard is less stringent.[5]

Footnote 5 is changed to read as follows:

All of the language appearing on page 12 of this slip opinion immediately following the quotation and just prior to Section III is changed to read as follows:

> The amicus argues that the direct action must rest upon diversity jurisdiction and that the quoted proviso destroys diversity between Olympic and Nebel's insurer. It is not necessary for us to decide that question because the proviso was not enacted until August 14, 1964, while Olympic's direct action was filed in the district court on January 30, 1962. Thus it is clear that the new proviso is inapplicable to this case. Neither do we decide whether suit could be filed directly against the insurance company under principles of maritime law under allegations that the insurance policy is a maritime contract.

The petition for rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor

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[5]Caradelis v. Refineria Panama, S.A., 384 F.2d 589, 593 (5th Cir. 1967); San Pedro Compania Armadoras, S.A. v. Yannacopoulos, 357 F.2d 737, 740 (5th Cir. 1966).

of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, and CARSWELL, Circuit Judges.

BROWN, Chief Judge, WISDOM, THORNBERRY, GODBOLD, DYER and SIMPSON, Circuit Judges, would grant the petition for rehearing en banc.
BROWN, Chief Judge, with whom DYER and SIMPSON, Circuit Judges, join, dissenting:

I agree with much of the Court's opinion. I disagree with the result and some of the opinion which to me, leads to an incorrect result.

I am first in agreement that we can no longer postpone the evil day of judgment. I agree that the time has come for an answer "to what fifteen years later has perhaps turned out to be something less than the riddle or 'grisly spectre' supposed."[1]

I agree also that the Limitation of Shipowner's Liability Act, 46 U.S.C.A. § 183, et seq., was not intended to, and does not, afford protection to insurers as such. But this is a long way from concluding that the Louisiana

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[1]Continental Oil Co. v. The London Steamship Owners Mut. Ass'n, Ltd., 5 Cir., 1969 ..... F.2d ..... [No. 25372, Sept. 23, 1969] citing in notes 5 and 6 Guillot v. Cenac Towing Co., 5 Cir., 1966, 366 F.2d 898, 1966 A.M.C. 2685; Ex Parte Tokio Marine & Fire Ins. Co., 5 Cir., 1963, 322 F.2d 113, 1964 A.M.C. 308; Coleman v. Jahncke Service, Inc., 1965, 341 F.2d 956, 957, 1966 A.M.C. 1115, *cert. denied*, 1966, 382 U.S. 974, 86 S.Ct. 538, 15 L.Ed.2d 465.

District Action Statute, L.R.S. 22:655,[2] by the operation of the distinctive Louisiana Codal Provision of Article 2098,[3] can alter the distinctive uniformity of the Ad-

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[2]The Statute provides:

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy and any judgment which may rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy."

LRS 22:655 (Supp.).

[3]Art. 2098. Defenses available to debtors in solido

Art. 2098. A codebtor *in solido*, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors.

He can not plead such exceptions as are merely personal to some of the other codebtors."

La. Civ. Code art. 2098.

miralty to impose on an underwriter liabilities beyond those for which the assured is legally liable.

At the outset the Court's first mistake, in my judgment, is to read the enigmatic 4-1-4 *Jane Smith*[4] decision as anything other than a decision for that day and case only. To construct a majority, Mr. Justice Clark with the swing vote thought it inappropriate to reach ultimate decisions on these disturbing questions when the whole thing for that case might well wash out if decision were deferred until liability was determined or the limitation proceedings concluded. That is the history of that case as we and others have applied it.[5] Thus the Court errs in proceeding as though the Supreme Court has resolved either the construction, application and interpretation of the Louisiana Statute, or, equally important, the extent to which its impact upon the underwriter can amount to a direct burden on the shipowner in excess of that which Congress has determined he shall bear when entitled to limit his liability under the Statute.[6]

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[4]Maryland Cas. Co. v. Cushing, 1954, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806, 1954 A.M.C. 837.

[5]See *Guillot* and *ExParte Tokio*, note 1 *supra*.

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[6]From reading the briefs one gets the impression that the impact of the Direct Action Statute on the limitation of liability proceeding and on the unlimited liability of the insurer was an after-thought upon the completion of the trial of the merits of the case. So much is this so that this record scarcely contains much information other than the insurance policy and a limited, sketchy outline of the possible economic effect which the underwriter's liability may have on the shipowner's loss for the casualty in question. This is stressed because this dissent does not advance the proposition that the record demontrates that by imposing unlimited liability on the insurer there will be an economic loss to the shipowner which sacrifices in substantial part the protection which the Congressional Act affords to one found to be without fault or privity. Rather it is to emphasize the importance of that factor for a full evidential development. The criticism I hold is that this is ruled out absolutely as a factor. This reads the 4-1-4 riddle as though the justices intended to, and did, determine an economic fact as a matter of law.

As I view it the basic defect in the Court's opinion is that, from a Louisiana point of view, it misconstrues entirely the meaning of the Louisiana Direct Action Statute. Describing the effect of the Statute we recently said that it "legislatively expunges the traditional 'no action' clause of a liability policy to permit a party injured in Louisiana to sue the liability insurer directly without going through the process of suit and judgment against the Assured." Continental Oil Co., note 1 *supra* at slip op. 2-4. The Statute was not intended to create a new liability against the insurer. It was intended merely to afford a direct, non-circuitous means of satisfaction of a claim judicially determined to be owing by the assured and which is within the limits and terms of the coverage afforded by the insurance policy. This is the plain language of the Act itself:

> "It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the in-

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We are naive if in this era we suppose that the losses paid by an insurer are of no concern to the assured. He who calls the tune still pays the fiddler. Modern, large business uses a variety of sophisticated insurance coverages, the effect of which is that by a succession of layers of underwriters, excess, catastrophe umbrella coverages, etc., the assured really pays for his own losses plus a management fee for the stop-loss. A payment of $1 million by the direct insurer in excess of the limited value is bound to cost the shipowner something.

Although this record is sketchy, the briefs tell us without contradiction that "it has been estimated that excess insurance rates would rise from 25% and 50% based upon the affidavit of J. K. Sadler, 1965, submitted in support of the motion for rehearing in In the Matter of Indep. Towing Co., E.D. La., 1965, 242 F. Supp. 950." Likewise insurance costs were very much at the bottom of the *Morro-Castle*-induced 1936 amendments to the Limitation of Liability Act. "In the testimony preceding the 1963 amendments to the Limitation Act, it was brought home to Congress that one of the benefits to shipowners of their right to limit was lower insurance premiums. See testimony of Charles S. Haight before the House Committee on Merchant Marine and Fisheries on H.R. 9969 Part IV, 74th Cong. 2d Sess., 66-67, 129, and testimony on Ira A. Campbell before the same committee on H.R. 4550, 74th Cong. 1st Sess., 136-137."

> surer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state." (See note 2 *supra*)

Although it is plain that one of the purposes is to give protection to the injured party, the underwriter's liability is geared directly to that of the assured. For the Act goes on to provide:

> "It is also the intent of this section that all liability policies *within their terms and limits* are executed for the benefit of all injured persons . . . and that it is the purpose of all liability policies to give protection and coverage to all insureds . . . for any legal liability said insured may have as or for a tortfeasor *within the terms and limits of said policy.*" (Emphasis added) (See note 2 *supra*).

The Courts of Louisiana and this Court have repeatedly stressed the proposition that it is the underlying liability of the assured, not the liability of the insurer, which is to be determined. If that liability, once determined in a direct action against the insurer, is within the coverage of the policy, then the underwriter has a direct responsibility. But even though it is covered, the liability of the insurer is restricted to that afforded by the insurance contract, with only one exception of moment here — the "No Action" clauses are ineffectual.[7]

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[7]The Court is correct in rejecting the contention that this P & I policy (see note 2 of *Continental Oil*, note 1 *supra*) expressly limiting to the underwriter's liability for which the assured as shipowner "shall have become legally liable to . . . pay *and shall have paid*" is an indemnity policy requiring prepayment. This is just a salt water version of the No Action clause which the District Action Statute outlaws.

For present purposes even less need be said as to the traditional

For example, in Finn v. Employers' Liability Assurance Corp., La.Ct.App., 1962, 141 So.2d 852, 864, the Court states:

> "Nor do we find any merit in the contention that the direct-action statute created separate or distinct causes of action, one against the insurer alone and another against the insurer and the insured. The statute is remedial in character, rather than substantive, and does not create causes of action."

Similarly in *Mock v. Maryland Casualty Co.*, La. Ct. App., 1942, 6 So.2d 199, 201-02, the Court declared:

> "The statute merely affords a remedy and permits a direct action not under any theory that by the contract of insurance any right is created in plaintiff against the insurer but merely on the ground that, by the tort, rights are created which are permitted to be asserted directly against the insurer of the party at fault."

All of our cases sound the same note. We emphasize this in Ex Parte Tokio Marine & Fire Ins. Co., 5 Cir., 1963, 322 F.2d 113, 116:

> "And we are now clear that the direct action

P & I restriction which provides that "when the assured has any interest other than as a shipowner," the underwriter shall not "be liable . . . to any greater extent than if the assured were the sole owner and entitled to petition for limitation of liability . . ." This is obviously intended to exclude liabilities of a kind not related to the ownership or operation of the ship by one standing in a relation to the vessel other than the owner.

> insurer stands as a party-litigant in exactly the same shoes as the assured."[8]

We phrased it this way in *Delegos v. Fidelity & Casualty Co.*, 5 Cir., 1963, 313 F.2d 809, 815:

> "Under the Direct Action Statute, the case may proceed against the insurer, but liability depends on legal liability of the assured. Whether, as the Act permits, the assured is joined with the insurer, the standard for recovery is identical."

As a matter of Louisiana law expressed by Louisiana courts and in our *Erie* role by this Court, the liability of the insurer is that of the assured. What is the liability of a shipowner, as the assured, who causes damage without his privity or fault? 46 U.S.C.A. § 183. The Limitation of Shipowner's Liability Act is plain. The liability is not to "exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C.A. § 183(a).[9]

Whether this is good or wise, good or bad public policy, is not for us to say. Until Congress changes the law, it is our obligation to interpret this Act in keeping with the objective of Congress in its effort to encourage

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[8]In a footnote at this point *Tokio*, quoting the intent portions of the statute set out in the text *supra*, states: "The Louisiana Direct-Action Statute emphasizes that it is the liability of the assured which counts."

[9]Sec. 183(a) states: "The liability of the owner of any vessel, whether American or foreign, for any . . . loss or destruction . . . of any property, goods, or merchandise . . . or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

shipping by putting a ceiling on losses which are brought about by circumstances beyond the control of the shipowner and his principal shore-based supervisory staff. This is not legislative largesse extended by Congress to a particular shipowner. It was enacted to encourage shipping by all who would engage in it, their identities completely unknown. It is not intended to extinguish responsibility on the part of the shipowner or to legislatively obliterate an obligation under the law toward those who might be damaged or injured. To the contrary, it is a recognition that if any such legal responsibility exists then the liability shall not exceed the value of the vessel after the casualty *unless* the damage has been brought about by circumstances which inculpate the shipowner by acts attributable to him directly or on notions akin to that of vice-principal. The defense of the Shipowner's Liability Act is one to put a ceiling on recovery.[10]

Unlike sovereign immunity, charitable immunity, minority, coverture, or the like, Shipowner's Limitation Act does not exonerate the shipowner. It merely provides an insulation against the consequences of damage done by agents not standing in the role of a vice-principal. Its background and purpose are described in *Butler v. Boston and Savannah Steamship Company*, 1889, 130 U.S. 527, 549, ____S.Ct.____, ____, 32 L.Ed. 1017, 1022:

> "If we look at the ground of the law of limited responsibility of ship-owners, we shall have no

[10]Of course under Rule F (see 39 F.R.D. 162) of the Admiralty Rules (see 39 F.R.D. 146-67) the shipowner is entitled in the limitation proceeding to assert (a) a right to complete exoneration and (b) failing that, a right to limit. Actually this merely provides a forum with a concursus because exoneration does not rest upon the Limitation Statute. Exoneration rests upon the applicable principles of maritime law, federal or international, common or statutory.

> difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge."

In *Norwich & New York Transportation Co. v. Wright*, 1872, 80 U.S. 104, 116, ... S.Ct. ....., ..., 20 L.Ed. 585, 589, it was phrased this way:

> "The history of the limitation of liability of ship-owners is matter of common knowldege. The learned opinion of Judge Ware in the case of *The Rebecca*, 1 Ware, 187-194, leaves little to be desired on the subject. He shows that it originated in the maritime law of modern Europe; that whilst the civil, as well as the common law, made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship."

Once the shipowner has obtained a decree entitling it to limitation of liability, the vessel and all the owner's assets are insulated from execution or seizure in excess of the limited value. See *Just v. Chambers*, 1941, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903. The right to limit does not absolve the shipowner of liability which remains unchanged. What it does is put a ceiling on recovery. *Oliver*

J. Olson & Co. v. American SS Marine Leopard, 9 Cir., 1966, 356 F.2d 728, 1966 A.M.C. 1064.

The right to limit liability is not one which inheres in the "person" of the shipowner. It is available to a shipowner of a specific vessel under some circumstances. It is not available under others. It does not turn upon his status as shipowner. And it is not a right which he as shipowner can claim. The right to limit inheres in the nature of the transaction giving rise to the underlying obligation and the shipowner's participation in it under the concepts of "privity or knowledge". See G. *Gilmore & C. Black, The Law of Admiralty, Chap. X*, §§ 10-22-10-24, pp. 698-704 (1957).

This ceiling, this insulation, is one that inheres in "the nature of the obligation." La.Civ.Code art.2098 (note 3 supra). If the circumstances giving rise to the law's imposition of the legal consequences are such as to satisfy "the privity or knowledge" standard, the shipowner's liability is of a limited character. If, on the other hand, the circumstances are such that "privity or knowledge" is not met, then the shipowner's liability is an unlimited one.

On this approach it is a direct interference with and restraint upon the congressional policies assuring limitation of liability to the value of the vessel after the casualty to treat the shipowner's right to limit as the so-called personal defense under the Louisiana Codal Article 2098 (see note 3 supra). Matter of Independent Towing Co., E.D.La.,1965, 242 F. Supp. 950, 1965 A.M.C. 818, is therefore, in my judgment, completely wrong. In this approach the technical Codal provision on obligations *in solido* comes into a direct clash with mari-

time principles and congressional policies. However obscure the Lousiana dialectic might be to many of us between "exceptions personal to the debtor" as distinguished from "exceptions resulting from the nature of the obligation," it is clear to me that this is in no sense a "personal" defense of the caliber of sovereign immunity, charitable immunity, or the like.

The unrealistic nature of the Court's holding that this federal statutory policy is a "personal" defense unavailable to the direct liability insurer under Art. 2098 is revealed by a few illustrations of highly probable situations.

A classic one is a collision in inland waters caused solely by the flagrant negligence of a compulsory pilot conning the vessel. In that situation the shipowner has no personal liability. A judgment cannot be rendered against the shipowner *in personam*. *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 1901, 182 U.S. 406, 21 S.Ct. 831, 45 L.Ed. 1155; G. Gilmore & C. Black, The Law of Admiralty, Chap. VII, § 7-16, pp. 429-32. Of course the vessel is liable *in rem*, *The SS China v. Walsh*, 1869, 74 U.S. (7 Wall.) 53, 19 L.Ed. 67. But the latter remedy might be ineffectual from lack of sufficient value, the total loss of the vessel, by a sinking following the collision, etc.

Suppose in such a situation the operator (say, as bareboat charterer) has a liability insurance policy which covers the in *personam* liability of the shipowner only with in rem liability specifically excluded. Of course it is the navigational operation of the vessel which gives rise to the claim and there would be a judicial declaration that such operation was faulty, that is, negligent.

But there could be no decree against the owner since no *in personam* judgment could be rendered. But on the Court's reasoning, the insurer would be liable under the Direct Action Statute because this defense of non *in personam* liability would be personal to the shipowner. It is quite evident that any such result is rewriting the contract of insurance for it makes an insurer liable for risks which it did not insure since it insured only those risks for which the assured had an *in personam* responsibility.

In the same situation suppose the shipowner has no *in rem* insurance (such as Hull), but it does have a typical comprehensive general liability policy issued on the usual casualty form which specifically excludes liabilities arising from the ownership or operation of watercraft under the now familiar Watercraft Exclusion. To allow recovery against the insurer under the Direct Action Statute in such a case would again be to rewrite the contract entirely. It would legislatively extinguish the Watercraft Exclusion. It is unlikely that the Court would ever go that far because at that point the Court would have to recognize that this was one of "the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured. . . ." (L.R.S. 22:665, note 2 *supra*). But this is no more a lawful term of the policy than that contained in the P & I policy involved here. By its express terms the underwriter confines his responsibility to the liabilities imposed by law on the assured. The policy provides that the underwriter "undertakes to pay up to the amount hereby insured. . . such sums as the *assured* . . . shall have become legally

liable to . . . and shall have paid."[11] (emphasis added).

Another illustration readily comes to mind. A collision on inland navigable waters of Louisiana between SS Law and SS Order in which the Court declares a 50/50 mutual fault outcome as a result of negligence of both vessels. The damages of SS Law are $100,000 and those of SS Order are $50,000. Of course, it is the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between th two." The Sapphire, 1873, 85 U.S. (18 Wall.) 51, 56, 21 L.Ed. 814, 816. The result is that the vessel suffering the lesser damage pays one-half of the difference so that on striking the balance SS Order would pay to SS Law $25,000[12] Suppose, however, that the owner of SS Order has a liability policy with policy limits of $200,000. On the Court's reasoning the liability of SS Order to pay only $25,000 is "personal". Paraphrasing the unexpressed, undisclosed reasoning, this is because the limitation of $25,000 relates to this shipowner in this situa-

[11]As in note 7 *supra* I would emphasize again that I agree that the Direct Action Statute extinguishes the requirement of prepayment by the assured as a condition to underwriter liability. By the act there is no distinction between a liability policy and an indemnity policy. But these policy provisions do reflect the clear purpose of the underwriter to pay only such claims as are based upon the liability imposed by law on the assured. If there is no liability or if that liability is restricted or otherwise limited, then that is the position of the insurer as well.

[12]It works this way.

Damages of SS Law	$100,000	
Damages of SS Order	50,000	
One-half of the difference	25,000	
SS Law bears own loss	100,000	
less from SS Order	25,000	
		$75,000
SS Order bears own loss	50,000	
plus payment to SS Law	25,000	
		$75,000
Total Damage		$150,000

tion and does not arise out of the nature of the liability independent of this specific situation. Adopting that course, the liability insurer of SS Order would have to pay to SS Law the full $100,000 and, in any event, an additional $25,000.

But I doubt that the Court would treat that as "personal". It would adhere to maritime principles and declare that the maximum *substantive* liability of SS Order is $25,000 and restrict recovery to that amount from the shipowner and its direct action liability insurer.

If the Court's present decision would lead it to hold the $25,000 limitation to be "personal", then one sees how a Louisiana local, intra-debtor policy is allowed to overlap into the federal exclusive domain. If, on the other hand, the Court would reject the idea of "personal" defense, one sees quickly how unrealistic it is to tie the "personal" defense to the shipowner's right to limit liability.

Thus, to the above illustration add the further wrinkle that SS Order is allowed to limit liability, and the limited value is $40,000. Without the benefit of this Court's present decision on direct action liability, all the owner of SS Law would get is $25,000, being one-half the difference between the two.

To see where this leads, some salt-water background is helpful. At an early date an effort was made to import into the American practice the English rule which allowed recovery before applying the limitation fund. On that theory SS Law with $100,000 damages recovering one-half its losses would exhaust the value of SS Order

($40,000.). But that would make the losses of SS Order $90,000 because it would (a) suffer its own $50,000 damage and (b) pay one-half of the losses of SS Law up to the value of $40,000.[13]

But in *The North Star*, 1882, 106 U.S. (16 Otto) 1728, 27 L.Ed. 91, 96, the Supreme Court declared that to follow any such English rule would "often result, and would in this case result, in positive injustice." The true rule, so the Court held, was this: "The rule of admiralty in collision cases, as we understand it, is, that, where both vessels are in fault, they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount of course, is one half of the difference between the respective losses sustained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it."

In reaching this result, the Court rejected the contrary view which allows each to recover one half its own damage from the other without regard to limited liability rather than bear one half of the total losses sustained by both.

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[13]

SS Law:		
Damages	$100,000	
Recovers from SS Order Limitation Fund	40,000	
SS Order:		
Own damage	$50,000	
Payment to SS Law from Limitation Fund	40,000	
Net Loss		$90,000

And yet, that is exactly what the Court's action allows under our present decision, only more so. For applying the usual rule, SS Law recovers one-half of the difference or $25,000, and under the present decision it recovers not less than $25,000 from the direct action liability insurer of SS Order.[14]

The irony of this is that with no limitation of liability the maximum liability of SS Order *and* its direct action insurer would be $25,000 (see note 12 *supra*). Here, by the mere presence of a limitation proceeding, with a limited value in excess of the substantive liability due, what is totally irrelevant now becomes a "personal" defense to impose on the insurer a liability which the assured does not have.

It is impossible in this situation to find any sort of "personal" defense in SS Order which on the Court's ruling is not available to the direct action liability insurer. Under the law SS Order has a liability for only one-half of the total damages suffered by both. Under the law this cannot exceed the $50,000 sustained by it and one-half the difference, $25,000 payable to SS Law. That is the maximum liability, with or without limitation of shipowner's liability.

Suppose the tables are reversed and it is SS Law with a liability policy that is entitled to limit liability with the value after the casualty being $40,000. Under *The North Star*, SS Order pays $25,000, which is one

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14 SS Law:

Recovers from SS Order		
1/2 Difference	$25,000	
Direct Action Insurer	25,000	
Total Recovery		$50,000

half of the difference between the two. SS Order would collect nothing. But under the Court's decision, since she sustained $50,000 in her own losses and SS Law was held also at fault, SS Order gets another $25,000 from the direct action liability insurer to make a total recovery of $50,000 — an amount which is not one-half of the total losses, but 100% of her own loss. Again the mere circumstance of an irrelevant limitation proceeding somehow turns a substantive non-limitation-of-shipowner's-limited-liability into a "personal" defense, which thereby subjects the insurer to a liability the assured did not have.

In neither situation may this possibly be described as a "personal" defense. The only distinction between the two is that in the former the pursued (SS Order) had the lesser damages and was limiting liability while in the latter illustration the pursued had greater damage and was limiting liability. Whether this is really a distinction or not is highly debatable. But one thing is certain. In no sense in either situation is it a result of a "personal" status, claim, right, or defense available solely to the assured unrelated to the underlying circumstance, transaction or occurrence giving rise to liability.

As long as the Direct Action Statute subjects the insurer to no greater liability than the assured would have, it fulfills the Louisiana policy of public protection and avoids troublesome questions of conflict between state and federal maritime law. The Court's reading rewrites the contract, imposes liability beyond that of the assured and ignores substantive limitations on liability under maritime principles. The essental uniformity of the admiralty is at an end when for a like

casualty across the line in Texas the "liability" of the shipowner is less — by the amount of total damages and the policy limits — than it is in Louisiana.

Not even a Delphic voice can unriddle 4-1-4 that much.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26386

D. C. Docket No. Adm. 5099 & 5187

OLYMPIC TOWING CORPORATION,

Plaintiff-Appellee,

versus

NEBEL TOWING COMPANY, INC., ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEWIN, McGOWAN* and MORGAN,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

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*Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk in this Court.

July 9, 1969

Issued as Mandate:

APPENDIX C

LOUISIANA DIRECT ACTION STATUTE, LA. R.S. 22:655

§ 655. Liability policy; insolvency or bankruptcy of Insured; direct action against insurer.

No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or

injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy. As amended Acts 1962, No. 471, § 1.

Art. 2098. Defenses available to debtors in solido

Art. 2098. A codebtor *in solido*, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors.

He can not plead such exceptions as are merely personal to some of the other codebtors. La. Civil Code. of 1870.

LIMITED LIABILITY ACT—(Extracts)

"The liability of the owner of any vessel . . . for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 USC 183(a).

"Whenever . . . the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each [claimant] . . . they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose . . . the owner of the vessel . . . may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto." 46 USC 184.

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels. . . ." 46 USC 186.

"Except as otherwise specifically provided therein, the [foregoing] provisions . . . shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation. . . ." 46 USC 188.